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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

OLIVER L. NORTH,
Cross-Petitioner,
v.

UNITED STATES OF AMERICA,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CROSS-PETITIONER'S REPLY MEMORANDUM

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CROSS-PETITIONER'S REPLY MEMORANDUM

I. THE PARTIAL DIRECTED VERDICT

In its effort to show that the panel majority's harmless error analysis on Count 6 can be squared with prior cases, the IC leaves the impression that the district court merely failed to instruct the jury on the "pending inquiry" element of 18 U.S.C. § 1505.[1] In fact, the district court did not just *omit* the "pending inquiry" element; the court *decided that element itself* and explicitly *precluded* the jury from considering whether an inquiry was pending. The district court instructed the jury "as a matter of law" that "inquiries were pending" and informed the jury that "[y]ou need only deliberate regarding the other three elements." App. 84a; JA 545-46. Because this case involves a directed verdict on the pending inquiry element, and not merely a failure to instruct on that element, the post-*Carella* failure-to-instruct decisions upon which the IC relies (Cross-Opp. 13)[2] are inapposite.

Similarly, the cases that the IC cites (Cross-Opp. 9, 10, 13) involving presumptions and misinstructions do not suggest that harmless error analysis is appropriate

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[1] *See* Cross-Respondent's Brief in Opposition ("Cross-Opp.") i, first Question Presented ("failure to submit an element of the offense to the jury"); *id.* at 3 ("district court erred in not submitting the first element" to the jury); *id.* at 9, heading A. ("Failure To Instruct The Jury On An Element Of The Section 1505 Offense"); *id.* at 9 ("the district court's failure to submit an element of the Section 1505 offense to the jury"); *id.* at 10 ("instructions that fail to require findings"); *id.* at 13 ("failure to instruct on an element of the offense"); *id.* (omitted element").

[2] *See Martinez* v. *Borg*, No. 89-56163, 1991 U.S. App. LEXIS 7314 (9th Cir. Apr. 25, 1991) (failure to instruct that aider and abettor must have specific intent to aid principal's crime); *Hennessy* v. *Goldsmith*, No. 89-16251, 1991 U.S. App. LEXIS 5032 (9th Cir. Apr. 1, 1991) (failure to instruct on "voluntary release" element of kidnapping offense). Neither of these cases discusses whether a directed verdict on an element of the offense can be harmless.

when the district court decides an element of the offense.[3] Several of those cases expressly distinguish presumptions and misinstructions from partial directed verdicts. In *Rose* v. *Clark*, 478 U.S. 570 (1986), for example, this Court declared that "[b]ecause a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Id.* at 580 n.8 (quotation omitted); *see Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (citing *Rose*, Court holds misinstruction subject to harmless error analysis because jurors "were not precluded from considering" an element).

The IC asserts that the partial directed verdict in this case is equivalent to a mandatory presumption (and therefore subject to harmless error analysis) because such presumptions " 'directly foreclose[] independent jury consideration of whether the facts proved establish certain elements of the offense[].' " Cross-Opp. 10 (quoting *Carella* v. *California*, 491 U.S. 263, 266 (1989)). But as this Court made clear on the same page of *Carella* that the IC cites, a presumption, unlike a partial directed verdict, does not entirely preclude the jury from determining whether an element has been proven: " 'Nor is *Sandstrom* error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v. *Johnson*, 460 U.S. 73, 96-97 (1983) (Powell, J., dissenting).' " *Carella*, 491 U.S. at 266 (quoting *Rose*, 478 U.S. at 580). As Justice Powell pointed out in *Johnson*,

> [a] directed verdict removes an issue completely from the jury's consideration. [A conclusive] pre-

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[3] *See Carella* v. *California*, 491 U.S. 263 (1989) (conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (misinstruction); *Rose* v. *Clark*, 478 U.S. 570 (1986) (mandatory rebuttable presumption); *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (conclusive presumption); *H* v. *Maloney*, 927 F.2d 646 (1st Cir. 1990) (conclusive presumption); *United States* v. *Dotson*, 895 F.2d 263 (6th Cir.) (failure to instruct clearly on element of the offense), *cert. denied*, 111 S. Ct. 94 (1990).

> sumption, by contrast, leaves the issue ultimately to the jury. A trial court's instructions are not limited to the presumption. A court also, as was done in this case, will charge that the defendant is presumed innocent and that the State must prove beyond a reasonable doubt each element of the crime—including [the presumed element]. . . . In the context of these instructions, the presumption provides the jury only with one means by which the State's burden of persuasion may be satisfied.

460 U.S. at 95 (Powell, J., dissenting). Accordingly, the IC's effort to equate mandatory presumptions and partial directed verdicts for harmless error purposes should be rejected.[4]

The IC does not cite a single case in which this Court or any other court has *suggested*—much less *held*—that a directed verdict on an element of an offense can be subject to harmless error analysis. In addition to the decisions of this Court cited above, every federal court of appeals to consider the question has declared that a partial directed verdict cannot be harmless.[5] The panel ma-

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[4] Contrary to the IC's suggestion, Cross-Opp. 12 n.8, North did not concede the "pending inquiry" element in his testimony at trial. *See* Cross-Pet. 8 n.7. The IC's "pertinency" argument (Cross-Opp. 12 n.8), which it never raised in the court of appeals, is meritless for the reasons that Judge Silberman stated. App. 216a-17a.

[5] *See, e.g., United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); *United States* v. *Mentz*, 840 F.2d 315, 324 (6th Cir. 1988); *United States* v. *Kerley*, 838 F.2d 932, 937 (7th Cir. 1988); *United States* v. *White Horse*, 807 F.2d 1426, 1429 (8th Cir. 1986); *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984). The IC's attempt to distinguish these cases (Cross-Opp. 12-13 & nn.10-11) misses the mark for the reasons set forth at Cross-Pet. 11-12 n.10. Moreover, the IC's contention that the *Dunkel* court "did not—and on the record before it, had no occasion to—address the question whether other findings by the jury (or concessions by the defendant at trial) might establish harmlessness," Cross-Opp. 12, begs the question presented here. If (as *Dunkel* and other courts have repeatedly held and as North contends) a directed verdict on an ele-

jority's decision conflicts directly with these decisions. If this Court grants the IC's petition for a writ of certiorari over North's opposition, it should grant the cross-petition as well.[6]

II. SECTION 1505

The IC's effort (Cross-Opp. 14-17) to distinguish *Cheek* v. *United States*, 111 S. Ct. 604 (1991), and *Liparota* v. *United States*, 471 U.S. 419 (1985), largely ignores the principle of fair notice that underlies those cases. In *Cheek* and *Liparota*, this Court construed criminal statutes to require knowledge of illegality to ensure that defendants would have notice that their conduct was unlawful. *See Cheek*, 111 S. Ct. at 609; *Liparota*, 471 U.S. at 426-27. Because 18 U.S.C. § 1505—like the statutes at issue in *Cheek* and *Liparota*—embraces a range of apparently innocent conduct, it should be construed to require proof of knowledge of wrongfulness or illegality.

The IC denies obliquely—and incorrectly—that § 1505 embraces innocent conduct. In a parenthetical buried in a long footnote, the IC quotes *Reeves* for the proposition that 18 U.S.C. § 1503 "covers only actions related to pending judicial proceedings, thus providing adequate no-

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ment of an offense is not subject to harmless error inquiry, then it is beside the point whether "findings by the jury" or "concessions by the defendant" might "establish harmlessness."

[6] The IC suggests that if this Court grants the IC's petition, it should hold North's cross-petition pending the decision in *Yates* v. *Evatt*, No. 89-7691 (argued Jan. 8, 1991). *See* Cross-Opp. 9, 14, 23. But the issue in *Yates* is the harmless error standard that should apply to *Sandstrom* errors, a question that divided the Court in *Carella*; *Yates* does not involve a partial directed verdict and does not present the question whether a partial directed verdict is subject to harmless error inquiry. Accordingly, if the Court grants the IC's petition over North's opposition, it should grant North's cross-petition regardless of the decision in *Yates*. But if the Court grants the IC's petition and would otherwise deny North's cross-petition, then we would request that the cross-petition be held to determine "if anything in *Yates* calls into question the correctness of the court of appeals' decision." Cross-Opp. 14.

tice to potential violators," and it adds that "in this regard, Section 1505, which reaches only actions related to pending congressional inquiries, stands on the same footing as Section 1503." Cross-Opp. 16 n.13. But the three panel judges were unanimous in their conclusion that § 1503 and § 1505 do *not* "stand[] on the same footing." The majority declared that because "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind," a presumption that an endeavor to obstruct a judicial proceeding is corrupt "may well be warranted" for § 1503. But, the majority continued, "to import that legal presumption to section 1505—and thus to assert that all endeavors to influence, obstruct or impede the proceedings of congressional committees are, as a matter of law, corrupt—would undoubtedly criminalize some innocent behavior." App. 63a-64a; *see* App. 181a-82a. The majority and the dissent furnished several frequently-recurring examples of apparently lawful conduct intended to obstruct congressional committees. App. 64a, 182a.[7]

In a final attempt to distinguish the fair notice principle that underlies *Cheek* and *Liparota*, the IC asserts that "this is not, in fact, a case involving 'apparently innocent conduct.'" Cross-Opp. 17. As Judge Silberman pointed out, the IC's characterization of North's alleged conduct is simply wrong. App. 189a. But while we dis-

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[7] The IC contends that the danger that § 1505 will be applied to apparently innocent conduct is "obviated" by the jury's application of the word "corruptly" according to its "common meaning." Cross-Opp. 17. But the common meanings of "corruptly" that the IC offers (Cross-Opp. 17) bear no resemblance to the district court's instruction on the "corruptly" element—that North must have had "the bad purpose to act in the precise manner the statute was intended to prevent. That is, to obstruct or to try to obstruct an inquiry or proceeding." JA 574. As Judge Silberman observed, "[q]uite clearly, [the district court's 'corruptly'] instruction does *not* permit the jury to apply 'corruptly' according to its usual definitions, but instead instructs them that a corrupt intent means merely an intent to obstruct." App. 183a (quotation omitted) (emphasis in original).

agree with the IC's contention, the significant point is that the issue of intent is for the jury to decide with the benefit of proper instructions and on the basis of all relevant and admissible evidence—including, in North's case, the evidence of authorization that the district court precluded the jury from considering because of that court's impermissibly narrow view of intent.[8]

III. RECIPROCAL DISCLOSURE

A. The Conflict with *Wardius* v. *Oregon*

Although the IC argues—contrary to the express language of *Wardius*—that due process does not require the government to produce the evidence that it will use to *rebut* evidence that the defendant is compelled to produce, Cross-Opp. 18, it acknowledges that due process "requires the government to offer discovery of the same quantum *and nature* as that required of the defense, so as to maintain 'the balance of forces between the accused and his accuser,'" Cross-Opp. 18-19 (emphasis added) (quoting *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973)).[9] The IC contends that no constitutional error occurred requiring application of the *Chapman* "harmless beyond a reasonable doubt" standard because it satisfied the "same quantum and nature" requirement. Cross-Opp. 18-21. This contention understates North's compelled disclosure, and it exaggerates the IC's disclosure.[10]

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[8] Moreover, whether North's alleged conduct was "apparently innocent" is irrelevant for purposes of construing § 1505. A criminal statute must be construed the same way for all defendants. In construing the statutes at issue in *Cheek* and *Liparota*, for example, this Court did not inquire whether the defendants' specific conduct was apparently innocent or whether they had notice that their conduct was unlawful; indeed, the conduct was plainly illegal in both cases. *See Cheek*, 111 S. Ct. at 606-07; *Liparota*, 471 U.S. at 434 n.17.

[9] *Wardius* makes clear that "any imbalance in discovery rights . . . should work in the defendant's favor." 412 U.S. at 475 n.9.

[10] The cases on which the IC relies (Cross-Opp. 19) are inapposite. Those cases involved technical violations of Fed. R. Crim. P.

1. *North's Disclosure.*—The IC attempts to minimize the significance of North's compelled disclosure by confusing North's *testimonial* CIPA notice, which is at issue here, and North's *documentary* CIPA notices, which are not at issue. The IC recounts at length the procedural history pertaining to classified defense documents, *see* Cross-Opp. 6-7, 20-21, and it suggests that the district court's failure to order reciprocal disclosure did not violate *Wardius* because asserted defects in North's *documentary* CIPA notices reduced the significance of his disclosures. Cross-Opp. 20-21.[11] But the purported lack of

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12.1(b), which requires the government to provide a list of alibi rebuttal witnesses. Such minor infringements of the rule—unlike the district court's total denial of rebuttal evidence following North's unprecedented pretrial disclosure—do not rise to the level of constitutional violations and therefore do not require application of the *Chapman* "harmless beyond a reasonable doubt" standard. *Mauricio* v. *Duckworth*, which applies the *Chapman* test in the context of a nonreciprocal alibi provision, is on point. 840 F.2d 454, 459 (7th Cir.), *cert. denied*, 488 U.S. 869 (1988).

[11] The IC's account of the handling of classified documents does not present an accurate picture. On November 14, 1988, over constitutional objection, North submitted his second documentary CIPA notice. At the time North filed the second notice, the broad conspiracy and fraud allegations were still a part of the indictment. Despite that fact, the notice included, even by the IC's estimate, only 3500 documents comprising between 25,000 and 30,000 pages—a miniscule fraction of the 900,000 pages of classified documents that the IC produced under Fed. R. Crim. P. 16 because they were material to the preparation of the defense. Under CIPA, the next step was for the court to conduct a hearing at which the use, relevance, and admissibility of the noticed documents would be determined. *See* 18 U.S.C. App. IV § 6(a). But on December 12, 1988, *without conducting a hearing, permitting the defense to explain the relevance of the listed documents, or even asking for copies of the listed documents*, the district court struck the CIPA § 5 notice. JA 421, 433. The district court then arbitrarily limited the defense to 300 classified documents at trial and directed North to provide a list of those 300 documents to the IC on January 3, 1989. JA 443.

Even though CIPA requires the defense to notice only *classified* information, 18 U.S.C. App. IV § 5(a), the IC consistently refused defense requests that it identify the classified material in documents it produced so that the defense could know what to notice. Even

clarity in North's *documentary* notices has nothing to do with North's *testimonial* CIPA notice. The IC virtually ignores the district court's conclusion that a "substantial portion" of the testimonial notice "contain[ed] relevant and material facts and information of value to the defendant" and "contain[ed] references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention." Cross-App. 15a. North's 162-page testimonial notice (reprinted at JA 3393-3555) provided the IC an unprecedented, fact-by-fact pretrial roadmap to the defense.[12]

2. *The IC's Disclosure.*—Although the IC was never compelled to disclose the anticipated trial testimony of its witnesses or to furnish any reciprocal disclosure under CIPA § 6(f), the IC asserts that other materials it provided balanced North's detailed disclosure of anticipated classified defense testimony. Cross-Opp. 20-21. But even under the IC's view, *Wardius* requires the government to provide discovery of the "same quantum *and nature* as that required of the defense." Cross-Opp. 18-19 (emphasis added). Although the IC satisfied the "quantum" prong of this test, it never provided information of the same "nature" as North's 162-page recitation

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after the district court struck North's second documentary CIPA notice and limited North to 300 classified documents at trial, the court denied North's request that the 3500 documents on the second CIPA notice be submitted for classification review so that the defense could determine what, if any, portions of the documents were still classified and use them at trial with the classified material redacted. JA 454.

[12] The IC does not contend that the district court's error was harmless under the *Chapman* test. Nor could the IC make such an argument; it does not deny that it dropped two weak charges, shifted its theories of prosecution, withdrew documents and witnesses, and shaped its opening statement in response to the pretrial disclosures that North was compelled to make in his 162-page testimonial CIPA notice. *See* Cross-Opp. 18-22; Cross-Pet. 24-25.

of expected classified defense testimony.[13] Neither the mass of documents that the IC produced nor the other materials to which the IC refers even began to balance the focused, fact-by-fact exposition of the defense provided in the CIPA notice. The compelled, nonreciprocal disclosure violated North's rights under *Wardius*, and the panel majority should have applied the *Chapman* harmless error standard.

B. The Conflict with *Kotteakos* v. *United States*

Contrary to the IC's representation, North does *not* "acknowledge[] . . . that the defendant must establish prejudice when the [nonconstitutional] error did not affect his substantial rights." Cross-Opp. 22 (citing Cross-Pet. 27).[14] At the page of the cross-petition cited by the IC, North paraphrased this Court's words in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The crucial language from *Kotteakos* upon which North relies—ignored by the IC—recognizes two categories of nonconstitutional errors: (1) those that are merely "technical," as to which the party seeking to overturn a judgment has the burden of proving harm, and (2) those the "natural effect [of which] is to prejudice a litigant's substantial rights," as to which the party seeking to sustain the judgment has the burden of proving absence

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[13] The IC successfully resisted making such a disclosure in connection with the district court's truncated pretrial *Kastigar* proceedings. The IC argued that it should not be compelled to meet its "heavy burden" under *Kastigar* before trial because "a pretrial hearing would force the government to take the expansive view of potential trial evidence," and would "compel the prosecution to preview for the defense all of the evidence to be used at trial." Memorandum of the Government in Response to Defendants' Motion to Dismiss Indictment and Suggested Steps for Considering *Kastigar* Issues, at 7, 9 (filed Apr. 8, 1988).

[14] The IC's paraphrase of North's position is incoherent. If a nonconstitutional error does not affect the defendant's "substantial rights," then it is by definition not "prejudi[cial]." Accordingly, it makes no sense to say that the defendant must *establish* prejudice when the error "did not affect his substantial rights."

of harm. *Id.* at 760 (quotation omitted). The "natural effect" of North's compelled, nonreciprocal disclosure unquestionably was to "prejudice [his] substantial rights." Accordingly, the court of appeals should have placed the burden of proving harmlessness on the IC.[15]

CONCLUSION

If the Court grants the IC's petition for a writ of certiorari over North's opposition, then the cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted,

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[15] The burden-of-proof issue was neither discussed nor decided in the cases that the IC cites at Cross-Opp. 21-22.